

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR RONALD HAILEY, III,

Defendant-Appellant.

UNPUBLISHED

December 17, 2009

No. 276423

Wayne Circuit Court

LC No. 06-008941-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR RONALD HAILEY, III,

Defendant-Appellant.

No. 276904

Wayne Circuit Court

LC No. 06-008939-01

Before: Hoekstra, P.J., and Murray and M. J. Kelly, JJ.

M. J. Kelly, J. (*concurring in part and dissenting in part*).

Although I do not join their analysis, I concur with the majority's decision to affirm in docket no. 276904. However, in docket no. 276423, I conclude that defendant's trial counsel's failure to properly investigate defendant's allegation that his brother and cousin were the perpetrators of the carjacking at issue fell below an objective standard of reasonableness. Because I also conclude that this failure prejudiced defendant's trial, I would reverse defendant's convictions and sentences in docket no. 276423. For that reason, I must respectfully dissent from the majority's decision to affirm in docket no. 276423.

When evaluating a claim of ineffective assistance of counsel, Michigan courts must apply the standard established by the Supreme Court of the United States in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). In order to establish ineffective assistance of counsel warranting reversal, a defendant must show that his trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 US at 687-688, 694.

The charges at issue in docket no. 276423 arose out of a robbery and carjacking by two men at a gas station. After robbing the victim at gunpoint, the perpetrators stole the victim's blue Jeep Cherokee, which was filled with musical instruments. After the police arrested defendant for the robbery and carjacking, defendant told them that his brother, Jerome Hailey (Hailey), and his cousin, Devaughn Brown, might have been the persons who committed the robbery and carjacking. A police officer recorded defendant's statement in a report, which was later provided to defendant's trial counsel. Despite this information, defendant's trial counsel did not try to contact Hailey or Brown before defendant's trial and did not ask defendant whether Hailey and Brown would be willing to testify on his behalf.

At trial, defendant denied that he was involved in the carjacking and robbery at issue. He stated that, although he did not remember what he was doing on the night at issue, he did recall a summer night when Hailey and Brown arrived at his home in a blue Jeep Cherokee around midnight. Defendant testified that Hailey and Brown tried to unload musical instruments from the Jeep, but that defendant's mother would not allow it and told them to leave. Defendant's trial counsel did not call Hailey or Brown as witnesses to corroborate defendant's testimony.

After defendant's conviction, the trial court granted defendant's motion for an evidentiary hearing to determine whether defendant's trial counsel provided defendant with effective assistance. At the hearing, both Hailey and Brown testified that they were currently serving prison sentences for carjackings and robberies that they committed together. They also stated that they were the persons who carjacked the Jeep at issue in defendant's trial and that defendant was not involved. They both also testified that they would have agreed to testify to these facts at defendant's trial had they been called. Finally, defendant's mother testified that she remembered a summer night when Hailey and Brown arrived at her house with a blue Jeep Cherokee and wanted to unload musical instruments, but that she ordered them away.

Defendant's trial counsel also testified at the hearing. She admitted that she never tried to contact Hailey or Brown despite knowing that defendant claimed that they committed the crimes at issue. She explained that she did not try to contact them because she knew that Hailey and Brown were facing separate carjacking and robbery charges and, on the basis of her eight years of experience in criminal defense, she did not believe that they would have confessed. She further stated that neither defendant nor his parents told her that Hailey or Brown would testify on defendant's behalf.

In *Strickland*, the Supreme Court of the United States explained that a defendant's trial counsel has a duty to make decisions concerning trial strategy only after reasonable investigations concerning the relevant law and facts:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. [*Strickland*, 466 US at 690-691.]

In this case, defendant's trial counsel's decision not to call Hailey or Brown as witnesses was not based on a reasonable investigation or reasonable professional judgment that supported the decision not to investigate. Defendant's trial counsel made the decision not to investigate in part on the basis of her experience that others do not typically confess to crimes. However, this was not by any measure a typical situation; the persons implicated were defendant's brother and cousin, and, they may very well have been willing to confess in order to clear defendant. Likewise, this was not a case where the witnesses were unknown or difficult to contact. Defendant's trial counsel had ready access to both Hailey and Brown. Yet she made absolutely no effort to contact them and ascertain whether they would testify on defendant's behalf. Indeed, defendant's trial counsel did not even ask her *own client* whether he thought his brother or cousin would be willing to testify. For this reason, I must conclude that defendant's trial counsel's decision not to call Hailey and Brown as witnesses fell below an objective standard of reasonableness under prevailing professional norms.

There is also a reasonable probability that, had defendant's trial counsel made a rudimentary investigation, she would have been able to call either Hailey or Brown at defendant's trial and elicited testimony that would have corroborated defendant's testimony. Even if a trial counsel's error is professionally unreasonable, it will not warrant reversal if it had no effect on the judgment. *Strickland*, 466 US at 691. Although a defendant need not show that counsel's deficient performance more likely than not altered the outcome in the case, the defendant must show that there is a reasonable probability that, but for the errors, the result of the proceeding would have been different. *Id.* at 693-694. Thus, reversal will be warranted where "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

After holding the evidentiary hearing, the trial court did not explicitly find that Hailey and Brown would not have testified; rather, it determined that, even if they had testified, it was not reasonably probable that the testimony would have altered the verdict.¹ I cannot agree. Although the jury would have been free to disregard Hailey's and Brown's testimony as incredible, I cannot conceive of testimony more compelling than an admission of guilt by third parties, who were also willing to testify that defendant had no involvement in the crimes. Further, defendant's trial counsel could have established that defendant had implicated his brother and cousin from the moment of his arrest. This fact, along with defendant's testimony, would have lent considerable weight to an admission by either Hailey or Brown or both. Given the weaknesses inherent in the prosecution's case, I must conclude that there was a reasonable probability that the jury would have had a reasonable doubt respecting defendant's guilt. *Id.* at 695.

Finally, I do not agree that defendant necessarily cannot show prejudice because he was afforded the opportunity to implicate Hailey and Brown during his testimony. Although this Court has stated that a defendant who claims ineffective assistance of counsel premised on a

¹ The trial court did state that it was doubtful that they would have testified on defendant's behalf. However, this is not a finding that resolves a factual question; the term doubtful leaves open the possibility that they might have testified.

failure to call witnesses must show that he was deprived of a substantial defense as a result of the failure, see *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004),² this rule does not trump the prejudice prong set in *Strickland*. This Court must apply the standard set in *Strickland*, see *Hoag*, 460 Mich at 5; and *Strickland* does not provide such a bright-line rule for determining prejudice. See *Strickland*, 466 US at 696 (noting that there are no mechanical rules for determining whether there was ineffective assistance warranting relief and stating that the ultimate focus of the inquiry in every case must be on the fundamental fairness of the proceeding). In any event, the requirement that a defendant show that he was deprived of a substantial defense merely recognizes that the defendant has the burden to prove prejudice consistent with *Strickland* and that the failure to call a witness will normally not meet that standard absent a showing that the defendant was deprived of a substantial defense. In this case, defendant had the opportunity to deny participating in the crimes at issue and to implicate his brother and cousin, but this testimony standing alone was not particularly “substantial.” Had Hailey or Brown testified that they were the perpetrators of the charged crimes and that defendant had no involvement, there is a reasonable probability that defendant’s otherwise meager defense would have prevailed. See, e.g., *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996) (holding that the defendant was deprived of the effective assistance of counsel where the defendant’s trial counsel unreasonably failed to call additional witnesses who could have testified that the defendant did not shoot the victim even though one witness did testify to that effect at trial).

Defendant demonstrated that his trial counsel’s decision not to call Hailey or Brown as defense witnesses under the circumstances fell below an objective standard of reasonableness under prevailing professional norms and that there was a reasonable probability that this error altered the outcome of his trial. For that reason, I would reverse in docket no. 276423.

/s/ Michael J. Kelly

² Many of the cases citing this proposition—including *Dixon*—trace their origins to *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985), which cited *People v Armstrong*, 124 Mich App 766, 771-772; 335 NW2d 687 (1983) for the proposition that a defendant must show that the failure to call a witness deprived the defendant of a substantial defense. However, in *Armstrong*, which predated the release of *Strickland*, this Court determined that the defendant failed to establish that his counsel was ineffective for failing to pursue an alibi defense because the defendant failed to present evidence that his trial counsel was aware of his claim of alibi and failed to present evidence that there were alibi witnesses who would have testified on his behalf. *Armstrong*, 124 Mich App at 771-772. The Court in *Armstrong* did not establish a bright-line rule that defendants who are afforded some opportunity to present a particular defense are necessarily incapable of showing that the failure to present additional evidence in support of that defense—including witness testimony—constitutes ineffective assistance of counsel.